

TOXOCITY PROGRAM REVIEW
STAKEHOLDER'S GROUP MEETING #4
November 8, 2001

PRESENT: Bill Ball, Joe Payne, Jay Beaudoin, John Barlow, Dan Kusnierz, Bill Zarlonisky, Darold Wooley, Frank Ruksznis, Steve Silva, Jennie Bridge, Bill Alsop, Marvin Cling, Brian Kavanah, Stuart Rose, Gregg Wood, Barry Mower, Clarissa Trasko, David Miller, David VanWie, Dennis Merrill

1. To follow up on the last meeting, several topics from the redrafted section B were discussed.
 - a. Supplementing or replacing the priority pollutant testing was discussed. The existing EPA list is old and newer chemicals are now in use. Pesticides are a good example of this. DEP suggested that for new chemicals to be considered, there should be water quality criteria to which test results can be compared and laboratory services should be available on a commercial scale. Also, the compound being considered should be in relatively common use. It was suggested that rather than prescribing an exact list, the rule could allow DEP some flexibility to modify the list from time to time. A good source of information is the Board of Pesticide Control, as that agency knows what chemicals are in common use and the availability of laboratory testing. A precautionary approach should be taken, with voluntary bans for some compounds and formal prohibitions if these means don't work and compounds are shown to be problem. There was general agreement that DEP should have some latitude to add newer chemicals to the testing list where necessary. Lists could be published and updated periodically.
 - b. The removal of a vertebrate species from the marine WET testing requirement was questioned. This was proposed since past testing has found very few silversides exceedences and some of those facilities have had exceedences with other species. Generally, testing should be done using both vertebrate and invertebrate species. DEP has discussed this with EPA and states do have some flexibility to modify tests species to best reflect local or regional experience.
 - c. Modifications to the lists of inorganic chemical testing were discussed. There are two basic lists: those required to be done with WET tests and the "analytical chemistry" to be done as a new, independent suite of testing in section B.3.d. DEP proposed to edit the latter list to remove tests related to WET testing such as specific conductance, total organic carbon, etc. The chemistry for WET is not specified in the rule, and DEP does have flexibility to list what needs to be done. A review of the list could be done outside of the rulemaking process.
 - d. In the past, the receiving water (background) testing with WET testing has been of limited value because of questions about sampling and testing methods. For the purposes of WET testing, receiving water is sampled just upstream of the point of discharge. To be of the most value, these tests should be done using clean methods. Ground water testing programs have a lot of data that could be reviewed. One possible approach would be to do receiving water testing only when there is a problem (with a WET test). Metals have not been required in marine waters.

2. DEP's straw-man proposal for changes to sections C and D of the rule was discussed, beginning with section C. It was suggested that when an exceedence is detected, the DEP should always provide written notification so the high tests get proper attention. Others noted that repeating tests should be a standard response to any exceedence. In part C.3, the time for submitting test results can be changed to allow a reasonable time for licensees to review the results. Only valid tests should be used in exceedence evaluations. Concerns with liability from citizen suits makes many facilities reluctant to accept license limits. For the purposes of setting license limits, several thought that DEP should have some discretion to review data and decide when limits are needed. Others felt that too much discretion would not be good. Situations where limits might not be needed included single "outlying" tests, or where the cause of a specific problem has been identified and resolved. Perhaps protocols could be developed to guide the DEP in reviewing each situation. Also, fact sheets accompanying licenses could be a vehicle to explain how the need for effluent limits is being evaluated. This is subject to public comment and review prior to license issuance.
3. For section C.4, most of the discussion was on whether or not concentration limits should be included in licenses. Some suggested the total mass discharged best represents the environmental risk from a discharge. Concentration is a way to define a level of treatment that should be attainable to minimize the amount of toxics discharged under various flow and/or production scenarios. The EPA's TSD recommends the use of concentration where the dilution factor is under 100:1. When a facility is operating well below its design flow, concentration limits may not be attainable or necessary to protect water quality. Some sources of metals, such as in raw materials or domestic use, cannot be prevented and conventional treatment cannot control them. EPA noted that it does not have a firm position on the issue; some states do like concentration limits as they are a direct measure of effluent quality and not compounded by other factors such as flow measurement errors. Some thought that concentration limits should be reserved for technology-based situations. A possible alternative would be for DEP to put tiers in license where the current flow is far below the facility's full design capacity.
4. In section C.5.a, there are no real differences between municipal and industrial sources in the context presented, and the language could be combined.
5. In discussion of section C.6, it was noted that laboratories should not be encouraged to only report down to DEP's detection limits. DEP noted that its intent is have the best analytical results reported without setting up a situation that punishes facilities for going beyond the minimum. In part 6.c, it was agreed to do reasonable potential calculations involving non-detect results at a standard level of one-half of DEP's reporting limits. There was concern about the flows DEP uses to calculate reasonable potential: the actual flows should be used rather than design flows. Often, design flows are far above level than can be expected in the reasonable future, and a finding of theoretical RP would prevent reduced testing. DEP noted that NPDES rules require design flow be used for calculation of POTW limits. Also, the license limits are set to cover what may happen in the future and must assume a discharger may go to full flow discharge. Putting tiered limits in a license may be a way to accommodate both the current level of discharge and still retain allowances for the future. Separate RP calculations could be done for past flows and design conditions. DEP will look

into this subject further and flesh out some ideas, taking into consideration who would be effected, trigger flows and the amount of testing.

6. In follow-up to previous meetings, there was a discussion of how DEP should proceed with development of the biocriteria rules. Some thought these rules should be part of the toxics program since impacts on aquatic organisms are part of the "three-legged stool" on which the toxics control program is based. DEP could put a reference in the rule to already published procedures. DEP noted that the biocriteria rule will be used for more than toxics control and are a measure of general compliance with narrative requirements in the law. DEP will put together an action plan and timeline for finalization of the biocriteria rule as soon as possible. Also, DEP would like to receive written ideas or proposals for how to develop a strategy to address concerns with sediment impacts.
7. In section D, provisions need to be added for addressing situations where river flows are divided by islands, etc. in making calculations of dilution factors.
8. Sections D.4 through D.6 are inter-related in that background and site specific conditions affect how multiple discharges to a receiving water are evaluated. To facilitate a discussion of these factors, DEP presented a model of how pollutant loadings could be managed on a watershed wide basis, in the form of a spreadsheet using the Penobscot River as an example. The basic concept is to set a total mass loading for the bottom of the watershed. This would be determined using the applicable chronic or human health water quality criteria, subtracting out allowances for background concentrations and a percentage for growth. The total allowable mass would then be distributed among discharge sources according to license flow. In addition to such a watershed wide allocation, analysis would be conducted for individual discharges to assure that acute criteria would be met and that cumulative in-stream concentrations would not exceed any criteria any point. (This model can be adjusted by changing the variables or assumptions to others suggested in the relevant sections of the straw man.) The group seemed generally satisfied with the model as a possible path forward.
9. To work on the hardness issue a sub-group consisting of Bill Ball, Bill Alsop, Jay Beaudoin, Nick Bennett, and DEP staff.